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Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1999

GREGORY J. GIBERNA
VANESSA M. GIBERNA

Petitioners,

vs.

BEULAH MCMILLAN CARTER
BENNIE JEAN CARTER

Respondents.

On Petition For A Writ Of Certiorari To
The Appellate Division Of New Jersey.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The New Jersey Grandparent Statute N.J.S.A. 9:2-7.1 is prima facie unconstitutional & is violative of parents fundamental rights to privacy & equal protection guaranteed under the ninth & fourteenth amendments of the Federal Constitution.

When, the New Jersey Appellate Court overturned the trial court judgement granting our adoption under N.J.S.A. 9:3-48a.(2) c. (4) (& The New Jersey Supreme Court denied us Certification) it contravened the law adopted by the state legislature, violated the doctrine of separation of powers found in the Federal Constitution, was violative of our rights to equal protection & due process guaranteed under the fourteenth amendment of the Federal Constitution.

The New Jersey Appellate Court (along, with the New Jersey Supreme Court which denied us Certification) was violative of our fundamental rights to due process & equal protection guaranteed under the fourteenth amendment of the Federal Constitution when it utilized Codified Law in reaching it's holding, which was not in effect at the time of trial.

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PETITION FOR WRIT OF CERTIORARI

Gregory J. Giberna & Vanessa M. Giberna respectfully request that a writ of certiorari issue to review the judgement & opinion of the Appellate Division of New Jersey.

OPINIONS BELOW

The opinions of the Somerset County trial court (App.1.) & the New Jersey Appellate Court (App.15.) are published. The New Jersey Supreme Court did not render an opinion.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 2403(b) & notifications required by Rule 29.4(c) we certified to the New Jersey Attorney General the fact the constitutionality of a statute was drawn into question. The opinion of the Somerset County trial court was issued on February 6, 1998, the New Jersey Appellate Court's opinion was issued October 23, 1998, & the New Jersey Supreme Court's order denying us Certification was issued August 3, 1999.

CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED.

1. New Jersey Adoption Statute N.J.S.A. 9:3-48.

2. New Jersey Grandparent Visitation Statute N.J.S.A. 9:2-7.1.

3. Amendment XIV of the United States Constitution.

STATEMENT OF THE CASE

Vanessa Bischoff Giberna (herein after known as V.B.G.) gave birth to Derek Christopher Bischoff (herein after known as D.C.B.) almost nine years ago out of wedlock on December 1, 1990. For the next five years, & until we married on July 15, 1995, she raised & financially supported her son D.C.B. with the help of her parents. For about the next four years her son D.C.B. has been reared & financially supported by the both of us. From the time D.C.B. was six months old, Gregory J. Giberna (herein after known as G.J.G.) had continually & consistently visited with his future step-son D.C.B. & wife V.B.G..

In contrast, except for a few short visits during the first several months following D.C.B.'s birth, his biological father Bennie Jean Carter (herein after known as B.J.C.) has never visited with & never financially supported D.C.B. Similarly, Beulah McMillan Carter (herein after known as B.M.C.), a paternal grandmother of D.C.B. & mother to B.J.C., has never visited with D.C.B.

In May of 1996, with the consent of his wife, G.J.G. filed a Complaint for Adoption of his step-son D.C.B., to which the biological father B.J.C. objected. In January of 1996, over six years after the birth of D.C.B., B.M.C. filed a Complaint for Visitation against V.B.G. In response, V.B.G. filed extensive pleadings citing numerous objections to visitation by B.M.C. with her son D.C.B. In April of 1997, over seven years since D.C.B.'s birth & almost one year since G.J.G.

filed for the adoption of his step-son D.C.B., B.J.C. filed a Complaint for Visitation against V.B.G.

In a Letter Opinion with a Court Order dated February 6, 1998, (App.1.) the trial court judge dismissed the objection of B.J.C. to the Complaint for Adoption by G.J.G. & the matter was listed for a hearing on the complaint for adoption. Further, the trial judge held B.M.C.'s rights to visitation were "derivative of those of B.J.C." "Then, the rights that" B.M.C. "has must rest upon the rights of B.J.C., if any". (App.7.) The trial court acknowledged:

> "there are situations in which a grandparent may indeed have rights of visitation with an infant which in affect are greater than the rights of the natural parent, those cases involve questions of rights of grandparents who have established and maintained a relationship with the child in question which predate the child's proposed adoption". "In this case, moreover it is conceded by B.M.C. that she has never seen or visited with the child". (App.7.)

A. The New Jersey Appellate Court reverses trial court order.

The Appellate Court held that when there is an objection from a natural parent to an adoption in a contested case the trial court must order an adoption agency investigation, an attorney or a guardian ad litem, or both for the child. (App.23.) Even though, the state legislature gave the trial court in the statute the discretion whether the foregoing need be ordered & stated specifically that in a step-parent adoption:

> "if the child has been in the home of the plaintiff for at least two years immediately preceding the commencement of the adoption

> action, and if the court is satisfied that the best interest of the child would be promoted by the adoption the court may dispense with such evaluation".(App.37.)
>
> The Appelate Court stated:
>
> "we have previously held the listed parental functions in the prior version of N.J.S.A. 9:3-46 should not be viewed as constituting an all inclusive list, & were provided by the Legislature as an attempt to identify the core values of parenthood". "Further, we rejected the notion that the Legislature intended to compel automatic severance of parental ties if a parent cannot perform one or more of the listed core functions for the stated time period". (App.28.)

In addition, the Appellate Court reversed the trial court's opinion that B.M.C.'s Complaint for Visitation was solely derivative of B.J.C.'s rights as a parent.

> The Appellate Court stated:
>
> "In our view, the issue of whether a grandparent is entitled to visitation can only be answered through a careful analysis of the statutory factors set forth in N.J.S.A. 9:2-7.1, where it remains the burden of the grandparent to prove by a preponderance of the evidence that the granting of visitation is in the best interests of the child. The grandparent's prior relationship with the child is only one factor to consider". (App.32.)

Moreover, the Appellate Court applied Codified Law in its analysis of this matter which, was not in effect at the time of trial. N.J.S.A. 9:3-46 the statute governing adoptions over the objections of biological parents was codified effective September 11, 1998. (App.24.) The trial for the adoption was held in November 12, 1997, almost a full year prior. Lastly, the Appellate Court stated it reversed & remanded the

trial court based on "procedural irregularities" (App.16.) even though none occurred.

B. The New Jersey Appellate Court denied our Motion for Reconsideration of their reversal of the trial court order.

On October 27, 1998, we filed with the New Jersey Appellate Court our Motion for Reconsideration. In an order dated November 2, 1998, from the Appellate Court our motion was denied. (App.35.)

In our motion to the Appellate Court we stated that under the adoption statute it was the trial court's discretion, under appropriate circumstances, as to whether to dispense with the adoption agency report when a natural parent objected. In addition, we questioned the Appellate Court's utilization of the Codified Adoption Statute in it's analysis of this matter. Further, we informed the Appellate Court the written opinion had contravened the current adoption law and they had violated our constitutional protections. Moreover, we informed the Appellate Court the determination of whether grandparents have a right to visitation of their grandchild lies with parents and not with the courts. We stated we did not believe the courts have the legal authority to intervene in the affairs of family, which are private in nature and are protected by the Federal Constitution.

C. The New Jersey Supreme Court denies our Petition for Certification.

On Friday November 13, 1998, we filed with the New Jersey Supreme Court our Notice of Petition for Certification. On Monday December 14, 1998, we filed with the New Jersey Supreme Court our Petition for Certification. In an Order dated August 3, 1999, the

New Jersey Supreme Court denied our Petition for Certification without opinion. (App.35.)

In our Petition for Certification, we informed the New Jersey Supreme Court that when the Appellate Court held when there is an objection from a natural parent, it is inappropriate to dispense with the agency investigation they had contravened the current law. In addition, we informed the court the New Jersey Grandparent Visitation Statute N.J.S.A. 9:2-7.1 was prima facie unconstitutional to parent's because it is violative of their right's to privacy & equal protection under the Federal Constitution. We stated, allowing grandparents to both, bring an action against parents for visitation, & granting visitation over the objections of parents was violative of parents right to privacy & equal protection under the Federal Constitution. Further, we informed the court they were violative of our constitutional rights to due process & equal protection when it applied Codified Law in reaching it's holding.

REASONS FOR GRANTING PETITION

By the New Jersey Supreme Court refusing to overturn it's Appellate Court on the matter of the state's grandparent visitation statute it remains in contrast with both, the state of Georgia & Tennessee, where their State Supreme Court's have ruled similar grandparent statutes unconstitutional. This important question of law should be settled since, it conflicts with relevant decisions of this court. Once again, by the New Jersey Supreme Court refusing to overturn it's Appellate Court on the matter of contravening the existing adoption statute it sanctioned a serious departure from the trial court, so as to call for this

Court's intercession. The foregoing provides a compelling basis for this court to review the decision of the New Jersey Supreme Court.

I. THE NEW JERSEY SUPREME COURT DECISION REGARDING THE STATE'S GRANDPARENT VISITATION STATUTE CONFLICTS WITH THIS COURT'S DECISIONS REGARDING PRIVACY RIGHTS.

The New Jersey Appellate Court held:
"under existing law, termination severs all legally mandated ties with the parent. We are not so sure as to extended biological family members, particularly grandparents & siblings". (App.31.) Then, they held:
"their continued right's to court ordered visitations, for instance, may very well survive termination of parental rights". (App.31.) Then, they held:
"But, the practicalities of such continued contact with extended biological family may well discourage judicial enforcement of such post adoption contact". (App.31.) The foregoing evinces the unilateral disarray of the Appellate Court on this matter in trying to give validity to a statute that is clearly unworkable for obvious reasons. Considering or granting grandparent visitation in situations where parents are vehemently opposed is potentially destructive & threatens the established structure of the entire family. Most importantly, a grandparent filing a complaint for visitation over the objections of a parent, which forces upon same the time, energy, cost, anguish & suffering of defending an unwanted litigation & court proceedings, will only be deleterious to the grandchild & the entire family. Should visitation be granted to the grandparent after the foregoing proceedings, that will be more deleterious to the entire family for obvious reasons.

Parents have a fundamental right to rear their children without state intrusion which, is expressed in the Constitution as a "liberty interest". This Court has acknowledged that right derives from privacy inherent in the Constitution. See Prince v. Massachusetts, supra, 321 U.S. at 166. Pierce v. Society of Sisters, 268 U.S. 510, 534-535 (45 S. Ct. 571, 69 L. Ed. 2d. 1070) (1925) law prohibiting parents from sending children to private rather than public schools unconstitutional because it would: "unreasonably interfere with the liberty of parents... to direct the upbringing & education of (their) children". Wisconsin v. Yoder, 406 U.S. 205, 235 (92 S. Ct. 1526, 32 L. Ed. 2d 15) (1972) exempting Amish from the state compulsory education law requiring children to attend school beyond the eighth grade. Meyer v. Nebraska, 262 U.S. 390, 399, (43 S. Ct. 625, 67 L. Ed. 1042) (1923) state law prohibiting teaching in school of any modern language except English held unconstitutional. The right to "liberty" guaranteed in the fourteenth amendment to the Constitution includes the freedom "to engage in any of the common occupations of life, to acquire useful knowledge, marry, establish a home, & bring up children".

The United States Supreme Court has long recognized a constitutionally protected interest of parents to raise their children without undue state interference. Prince v. Massachusetts, 321 U.S. 158, 166 (64 S. Ct. 438, 88 L. Ed. 645) (1944)

> "the custody, care & nurture of the child reside first in the parents... It is in recognition of this that decision have respected the private realm of family life which the state cannot enter".

Parents in this country have a fundamental right found in the penumbrae of the fourteenth amendment of the Constitution to establish a home & direct the

upbringing & education of their children without undue state interference. See Pierce v. Society of Sisters, 268 U.S. 510, 534 (45 S. Ct. 571, 69 L. Ed. 1070) (1925) Meyer v. Nebraska, 262 U.S. 390, 399 (43 S. Ct. 625, 67 L. Ed. 1042) (1923) Parents also have a right to privacy found in the ninth amendment. Griswold v. Connecticut, 381 U.S. 479 (85 S. Ct. 1678, 14 L. Ed. 2d 510) (1965)

II. THE NEW JERSEY SUPREME COURT DECISION REGARDING THE STATE'S GRANDPARENT VISITATION STATUTE CONFLICTS WITH BOTH, THE GEORGIA & TENNESSEE STATE SUPREME COURT'S.

Brooks v. Parkerson, 265 Ga. 189; 454 S.E.2d 769; 1995 holding grandparent statute unconstitutional under both their state & federal constitutions. Brooks v. Parkerson, 265 Ga. 189, 195; 454 S.E. 2d 769, 1995 Ga.

> "the relationship between parent & child is paramount. For this reason I cannot believe in either the constitutionality or the political correctness of any law that allows a court", " to pierce the delicate, complex & sacred unity of parent & child against the wishes of fit parents without a showing of absolute necessity. While I have no quarrel with governmental interference where a parents conduct may injure a child emotionally or physically, interference on less than those grounds is contrary to our common law tradition of protecting the nuclear family as the foundation of society & leaving fit parents, the exclusive right to determine what is in their children's best interest".

Brooks v. Parkerson 265 Ga. 189, 194 454 S.E.2d 769, 1995 Ga.

> "However, even assuming grandparent visitation promotes the health & welfare of the child, the state may only impose that visitation over the parents objection on a showing that failing to do so would be harmful to the child. It is irrelevant, to this constitutional analysis, that it might, in some instances be "better" or "desirable" for child to maintain contact with a grandparent. The statute in question is unconstitutional under both state & federal constitutions because it does not clearly promote the health or welfare of the child & does not require a showing of harm before state interference is authorized".

Hawk v. Hawk, 855 S.W.2d 573, 577 (Tenn. 1993)

> "we believe that when no substantial harm threatens a child's welfare, the state lacks a sufficiently compelling justification for the infringement on the fundamental right of parents to raise their children as they see fit".

Hawk v. Hawk, 855 S.W.2d 573, 580 (Tenn. 1993)

> "By holding that an initial showing of harm to a child is necessary before the state may intervene to determine the "best interests of the child", we approve the reasoning of both Tennessee & federal cases that have balanced various state interests against parental privacy rights. Implicit in Tennessee case & statutory law has always been the insistence that a child's welfare must be threatened before the state may intervene in parental decision-making".

Hawk v. Hawk, 855 S.W.2d 573, 580, 581 (Tenn. 1993) "The requirement of harm is the sole protection that parents have against pervasive state interference in the parenting process."

The New Jersey Grandparent Visitation Statute makes no mention of, nor does it require a showing of

harm to the child in question before state intervention is authorized. The respondent(s) attorney in his Letter Brief in Opposition to our Petition for Certification to the Supreme Court of New Jersey could only cite a 1994 Chancery Division case upholding the constitutionality of the Grandparent Visitation Statute. Lastly, in that same Letter Brief, the respondent(s) attorney conceded that parents have a fundamental right to raise their children without governmental interference.

III. THE NEW JERSEY SUPREME COURT'S DENIAL OF CERTIFICATION SANCTIONED BOTH, A SERIOUS DEPARTURE FROM THE TRIAL COURT, & VIOLATION OF OUR RIGHT'S TO EQUAL PROTECTION & DUE PROCESS UNDER THE LAW.

When the New Jersey Appellate Court overturned the trial court & held that when there is an objection from a natural parent to an adoption in a contested case the trial court must order an adoption agency investigation report, an attorney, or guardian ad litem, or both for the child, it contravened the law, violated the doctrine of separation of powers & was violative of our rights to equal protection & due process. The New Jersey Supreme Court's failure to remedy the situation both, sanctioned the Appellate Court making new law & violation of our right's under the law. The New Jersey Supreme Court also, sanctioned the Appellate Court's serious departure from the trial court ruling.

In addition, when the Appellate Court applied Codified Law in it's analysis of this matter, which was not in effect at the time of trial it once again, contravened the law, violated our right's to equal protection & due process. Once again, The New Jersey Supreme Court's failure to remedy the situation sanctioned both, the Appellate Court's violation of our

rights & marked a serious departure from the trial court ruling.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted. The judgement of the New Jersey Appellate Court should be vacated & the judgement of the trial court should be re-affirmed. In addition, the New Jersey Grandparent Visitation Statute should be held unconstitutional & the law should be struck down.

Respectfully submitted,

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"Pro Se" for Petitioner(s)

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SOMERSET COUNTY TRIAL COURT

CHANCERY DIVISION-FAMILY PART

No. FA-18-33-97A

IN THE MATTER OF THE ADOPTION
OF DEREK CHRISTOPHER BISCHOFF
BY GREGORY J. GIBERNA.

Somerset County Trial Court Letter
Opinion Dismissing Bennie Jean Carter's
Objection to Complaint for Adoption.

(Filed Feb. 6, 1998)

Before Helen E. Hoens Judge.

Before the Court is the complaint filed by plaintiff, G.G. in which he seeks to adopt an infant, D.B. It is undisputed by all parties that D.B. is the natural child of V.B.G. and of B.C. The complaint was filed in Middlesex County in 1996, but was thereafter transferred to Somerset County, as this is the County in which the natural mother and the infant reside with the plaintiff. Prior to the transfer, the infant's natural father, B.C., had filed his written objection to the adoption and a date for a hearing was set. In addition, shortly prior to the filing of the complaint, however, B.C., the infant's natural father and his mother, B.M.C., who is the mother of B.C. and the paternal grandmother of infant D.B., instituted actions in Middlesex County, their County of residence, seeking to enforce their respective rights to have visitation with the infant, which access had been denied to them by G.G. and V.B.G. The Family Division Judge in Middlesex County ordered that a visitation investigation be conducted and entered an Order permitting limited and supervised visitation by B.M.C., the infant's paternal grandmother. Prior to the commencement of any visitation, however, the Middlesex County Judge stayed all further proceedings in the Middlesex County actions, and ordered that those matters be transferred and consolidated with the pending complaint for adoption, previously transferred here.

On the first date set by this Court for a hearing, the infant's paternal grandmother requested that she be granted an opportunity to consult with and be represented by an attorney, and for reasons expressed on the record on that date, a new date for a hearing was set. In short, the reasons for the adjournment were essentially that on the initially scheduled date, the parties confirmed for the Court their inability to reach any consent on any of the issues and the Court

set the new date with the understanding that there would be sufficient time on that date for all parties to appear and be heard on all of the issues. On the second date set by the Court, the infant's natural father, B.C. did not appear and the infant's paternal grandmother advised the Court that he had been remanded to the custody of the Middlesex County Jail for an indeterminate amount of time. Over the objections of plaintiff G.G., the Court set a new date for the hearing, selecting a date on which the Court would arrange to have B.C. transported to the Courthouse from the Middlesex County Jail and at which time any and all issues would be heard.

All parties, including the plaintiff G.G., the natural mother of the infant, V.B.G., the natural father B.C. and the paternal grandmother, B.M.C. appeared on the next scheduled date. As the rights of B.M.C. in this case may be entirely derivative of the rights of B.C., see J. & E. v. M.& F., 157 N.J.Super. 478 (App. Div. 1978), cert. denied, 77 N.J. 490 (1978), the Court heard first the issues raised in the complaint for adoption. For the purpose of this phase of the hearing, the natural father B.C. was represented by counsel and plaintiff G.G. proceeded pro se. The Court heard the testimony of V.B.G. and B.C. and received a variety of documents offered into evidence by the parties. In addition, the Court heard the arguments of plaintiff G.G. and of counsel for B.C. and agreed, based upon the request of G.G., to review and consider as part of the evidence the report prepared by the Middlesex County Probation Department concerning the visitation investigation, and the objections filed by G.G. to that report in the Middlesex proceeding. The Court has had ample opportunity to hear the testimony of the witnesses and review the evidence offered by the parties. Now before the Court is the plaintiff's complaint for adoption and B.C.'s objection thereto.

Following the close of the testimony and the concession of all parties on the record that they had no further evidence or testimony to offer, plaintiff G.G. filed with the Court a motion seeking to have the undersigned judge recuse herself and order a new hearing before another judge or, in the alternative, staying all proceedings pending appeal of a denial of the recusal motion. Thereafter, plaintiff G.G., filed with the Court a further document seeking to call to the Court's attention that certain of the documents marked for identification by B.C. but not offered into evidence were forgeries and seeking to have the Court conduct an independent investigation into the claimed forgeries. We address this post-hearing motion and application first.

The motion is based upon the argument of plaintiff pro se that he was not treated "properly" during the hearing, that he was disadvantaged because he was proceeding without an attorney, and that he was treated in a hostile and confrontational manner by the Court. He believes that the Court exhibited bias towards him even prior to the time when B.C. retained an attorney and that, as a result, his complaint will be unfairly judged. He believes that evidence of this bias includes the Court's refusal to dismiss B.C.'s objection to the adoption outright when B.C. did not appear on the scheduled trial date. In general motions for recusal are raised well before the close of testimony, a matter which complicates the analysis of this application greatly. To the extent that G.G. believed well in advance of the appearance for the testimony that he was being treated unfairly, his silence, maintained until after the close of testimony operates as a waiver of this post-trial motion. Nor is the underlying basis for his concern, namely that he was not being permitted to present his evidence as he chose, an accurate recitation of the events on the day when the evidence was received. In point of fact, G.G.

was so adamant that he be given wide latitude to revisit and repeat areas of testimony and assist the natural mother by leading her through her testimony, that the Court eventually permitted him to proceed as he demanded. To the extent that he believes that he was disadvantaged in some fashion, a reading of the entire transcript will demonstrate that the very opposite occurred. Moreover, the arguments he raises relating to the conduct of the hearing and to the Court's earlier refusal to deny B.C. an opportunity to be heard are matters best left to the Appelate Division, particularly in light of the late time when they were raised. For these reasons, the motion for recusal and similar relief is denied.

Turning to the issues raised in the complaint, we make the following findings of fact and conclusions of law. V.B.G. met B.C. when she was about 17 or 18 years old, at a time when they both had jobs at a supermarket. They dated for approximately 6 months, then stopped seeing each other for a time, only to resume their relationship several months later. In 1990, V.B.G. became pregnant and told B.C. that she wanted to keep the child. She wanted the relationship to continue and the couple resided together briefly in the Fall of 1990. She left after a heated argument and went to live with her parents. While B.C. wanted her to return to live with him and asked her to do so, she refused. The two spoke on the telephone from time to time thereafter, but she was disappointed that he did not offer her either financial or emotional support as the date of the birth approached. On December 1, 1990, the day when the infant was born, he called her home to speak with her and learned that she was in labor, after which time he went to the hospital and saw her. Shortly thereafter, he was invited to her home by her parents to see his son. He spent between one hour and one and one-half hours there visiting. Within a brief time after this visit, she asked him to

help her to support the child and they agreed that he would pay to her $50 each week for this purpose. He sent to her three checks, dated December 15, December 28, 1990 and January 5, 1991 each in the amount of $50 and each of which was returned by the bank for insufficient funds. From that time forward, he has not paid nor has he offered to pay anything toward the support of the child. He has not attempted to establish a bank account nor has he attempted to send money to third parties for the child. He has not sent cards or gifts, although from January of 1991 onward, he has telephoned her from time to time and ask about the child. During each of these calls, the subject of financial support would be raised and the conversation would be terminated. As time went on, the gaps between these calls increased. In early 1994, B.C. saw V.B.G. while she was driving and attempted to stop her. When she refused to stop, she called out to him to telephone her, but he did not. In the Fall of 1995, after she and G.G. had married and moved to their current home, B.C. came to their door and asked to speak with V.B.G. She refused to see him and plaintiff G.G. sent him away.

B.C. concedes that the three checks did not clear and that he had never paid any monies for the support of the child. He contends that he was prevented from seeing the child and that his efforts to give the child a New Year's gift in 1991 were rejected. He offered an insurance card which was effective in 1992 while he was employed at Sears and which covered this infant, but concedes that he never advised V.B.G. that the company had provided health coverage for the child and that he has never since procured any insurance for the child.

The probation report prepared in Middlesex County and the written responses prepared by G.G. revealed additional pertinent information. Significantly, B.C. conceded that he has spent little

time with the infant. He conceded that from 1992 through 1994, he was involved in a relationship with a woman which caused his life to fall apart and during which time he made little or no effort to have any contact with the infant. He concedes all of the facts relating to his 1996 conviction and sentence and while he then expressed an intention to turn his life around, by the time of the hearing in this matter, he had been re-incarcerated as a result of an inability to complete the ISP requirements.

We address first the corollary issue of the rights of B.M.C., which rights we have earlier described as derivative of those of B.C. While there are situations in which a grandparent may indeed have rights of visitation with an infant which in effect are greater than the rights of the natural parent, those cases involve questions of the rights of grandparents who have established and maintained a relationship with the child in question which predate the child's proposed adoption. See Mimkon v. Ford, 66 N.J. 426 (1975). In the case before this Court, the ground on which the adoption is being contested is centered on the acts of B.C. in relationship to the child. In this case, moreover, it is conceded by B.M.C. that she has never seen or visited with the child. In this context, then, the rights that she has must rest upon the rights of B.C., if any.

The statute governing adoptions and objections thereto is N.J.S.A. 9:3-46, which provides as follows:

> a. A judgment of adoption shall not be entered over an objection of a parent communicated by the court by personal appearance or by letter unless the court finds:

(1) that the parent has substantially failed to perform the regular and expected parental functions of care and support of the child, although able to do so, or (2) that the parent is unable to perform the regular and expected parental functions of care and support of the child and that the parent's inability to perform those functions is unlikely to change in the immediate future. The regular and expected functions of care and support of a child shall include the following:

(a) the maintenance of a relationship with the child such that the child perceives the person as his parent;

(b) communicating with the child or person having legal custody of the child and visiting the child unless visitation is impossible because of the parent's confinement in an institution, or unless prevented from so doing by the custodial parent or other custodian of the child or a social service agency over the birth parent's objection; or

(c) providing financial support for the child unless prevented from doing so by the custodial parent or other custodian of the child or a social service agency.

A parent shall be presumed to have failed to perform the regular and expected parental functions of care and support of the child if the court finds that the situation set forth in paragraph (1) or (2) has occurred for six or more months.

Judged against this language, there can be no doubt but that B.C. has "substantially failed" to perform the "regular and expected parental functions" relating to this child and that he has been, at the very same time, "able to do so". In this regard, the ability to act as a parent has little to do with the cooperation of the custodial parent or her new spouse. Rather B.C. has at all times been able to perform the duties of a parent. He has been regularly employed and thus able in that sense to perform as a parent, he was given numerous opportunities by V.B.G. and her parents to visit with the child early on in the child's life, as a result of which he was indeed given the opportunity to be involved in the child's life. His suggestion that he was thwarted or prevented by V.B.G.'s parents, or later, her spouse, from access to the child is only true to the extent that we look to times in the child's life that are very recent. Significantly, the very language of the statute creates, on this record, a presumption against B.C. The statute presumes a failure to perform the regular and expected functions of a parent if one has failed to act for a period of six months. Even accepting as true B.C.'s testimony as to his efforts, there are not one but several gaps of significant lengths of time sufficient to give rise to the presumption against him. Indeed, the investigation report prepared in Middlesex County demonstrates a two year gap during which time he concedes he made no effort to engage in any contact with this child.

Equally significant to this case is the fact that the wording of the statute makes clear that the test is one of "substantial" failure, not absolute and complete failure. Here, there can be no question but that B.C.'s only efforts to create or maintain any relationship with the child were short-lived and sporadic. His unilateral cessation of providing any funds for the child, his giving the infant's mother not one but three checks

which did not clear, his decision to leave V.B.G.'s residence after seeing the child only briefly, his long absences from any passing effort to have any contact or communication with the child all operate to support the conclusion that he has substantially failed to perform the regular and expected duties of a parent. Nor can he excuse this failure by arguing that his efforts were thwarted. Even in the face of the objections of V.B.G. or others, he could have acted so as to meet the test of the statute. He could have set up his own bank account for the child, simply notifying V.B.G. of that fact in writing. He could have mailed checks to the infant's mother. He could have sent gifts or cards to acknowledge the child's birthdays or holidays. He could have made regular calls or visits. He did none of these things. B.C. having substantially failed to perform the regularly expected duties of a parent cannot therefore object to the complaint for adoption filed by G.G. For the foregoing reasons, we do not address the alternate ground of the statute, namely the issue of B.C.'s future ability to so perform.

Finally, we note that B.C.'s attorney argued that the proper focus of this analysis should be the period following the filing of the complaint for adoption, and that as a result, the Court should look only to events following July, 1995. In addition, we note that his attorney argued that the recommendation of the probation report that visitation should be permitted in an effort to provide B.C. with an opportunity to develop a relationship with the child should act as an estoppel of this Court reaching a contrary conclusion. First, we note that regardless of which time frame we were to utilize, the result here would be the same. Apart from the recent effort, initiated by B.M.C.'s desire to secure her right to visit with the child, B.C. has done virtually nothing to seek to establish or maintain any relationship with the child. Viewed in

terms of the many efforts he could have pursued alluded to in this opinion, he has substantially failed to act for any appreciable period of time. Indeed, he has done nothing for a substantial time period both pre and post 1995 and as a result cannot meet the test of the statute. Moreover, the focus of the probation report regarding visitation was not and cannot be the same as the focus of the inquiry that this Court is obligated to undertake in determining the issues raised in the complaint of G.G. for adoption. The focus of those proceedings and of that investigation is whether it would be in the child's best interest going forward to permit visitation and to permit an effort to establish a relationship. That choice may appropriately be made with little regard to a parent's past behavior. B.C.'s concession to that investigator that he had not attempted to see this child for two years because his life was in disarray, coupled with a hope for a brighter future and a promise to reform were viewed in that context as positive indications of concern for the child. The same information in the context of N.J.S.A. 9:3-46, however, is a concession of a failure to act for a period in excess of 6 months, a disqualifying factor in this proceeding.

Because the focus of the two proceedings is so different, the prior decision cannot act so as to estop this Court from deciding adversely to B.C. in this proceeding. Nor can we say that the adoption statute should be interpreted so as to require the Court to focus only on acts following the filing of the complaint. The appropriate time period for our analysis must be broadly interpreted so as to permit fair evaluation of all of the actions of the objecting natural parent consistent with the statute's essential purposes. The suggestion that the recommendation that supervised visitation be allowed cannot alter the fact, that as that

report itself concedes, the natural father simply had no relationship with the child and indeed has done nothing to attempt to develop or maintain one.

For all of the foregoing reasons, the objection of B.C. to the complaint for adoption by G.G. is dismissed. An appropriate form of Order is enclosed for the convenience of the parties. Counsel and plaintiff G.G. shall contact the Surrogate's Office to retrieve their original exhibits at their earliest convenience. The objection having been dismissed, the matter will be listed for a hearing on the complaint for adoption in the ordinary course.

SOMERSET COUNTY TRIAL COURT

IN THE MATTER OF THE ADOPTION OF DEREK CHRISTOPHER BISCHOFF BY GREGORY J. GIBERNA.

No. FA-18-33-97A

ORDER DISMISSING BENNIE JEAN CARTER'S OBJECTION TO COMPLAINT FOR ADOPTION.

(Filed Feb. 6, 1998)

This matter having come before the Court on the application of G.G. for an Order dismissing the objection to the adoption of the minor child D.B. by the natural father of the child, B.C. & the Court having heard the testimony of the parties November 12, 1997, & the court having read & considered the post-trial application & briefs & evidence submitted by all parties & for good cause shown,

IT IS on this 6 day of February, 1998

ORDERED, that for the reasons expressed in the Court's letter opinion dated February 6, 1998, the objections of B.C. the natural father of D.B. the infant to be adopted be & the same hereby are dismissed; & it is further

ORDERED, that for the reasons expressed in the Court's letter opinion dated February 6, 1998, the application of plaintiff G.G. for an Order of recusal, for

new trial, for stay of proceedings & other relief is denied.

/s/ H.E. Hoens,
H.E. Hoens
Judge

APPELLATE DIVISION OF NEW JERSEY

No. A-4023-97T5

IN THE MATTER OF THE ADOPTION
OF DEREK CHRISTOPHER BISCHOFF
BY GREGORY J. GIBERNA.

Appellate Court Letter Opinion
Reversing Trial Court Order
Dismissing Bennie Jean Carter's
Objection to the Adoption.

(Filed Oct. 1, 1998)

Before Judges Wallace, Newman & Fall.

PER CURIAM:*

In this appeal we examine the procedural requirements in considering a stepparent adoption over objection of the natural father and paternal grandmother. V.B.G. gave birth to the child, D.C.B., out-of-wedlock on December 1, 1990. B.C. is D.C.B.'s natural father, and B.M.C. is the child's paternal grandmother. G.G. is V.B.G's husband, who now seeks adoption of D.C.B. The natural father, B.C., and paternal grandmother, B.M.C., appeal from an order entered February 6, 1998, dismissing B.C.'s objection to the adoption, and from the trial judge's determination B.C.M.'s grandparental rights are solely derivative through B.C. Based on apparent procedural irregularities in the record, we reverse, and remand for further proceedings consistent with this opinion.

I.

The factual and procedural history of this matter is complex, convoluted, and requires extensive discussion to fully understand the procedural deficiencies. V.B.G. met B.C. when she was 17 years old. They dated periodically, and in 1990 V.B.G. and B.C. conceived D.C.B. The couple attempted to continue their relationship, cohabiting briefly in the fall of 1990. After a heated argument, they separated, V.B.G. leaving to reside with her parents. During the balance of V.B.G.'s pregnancy, they had occasional contact, but V.B.G. was disappointed B.C. failed to offer financial or emotional support as the date of birth approached.

After D.C.B.'s birth on December 1, 1990, B.C. did visit with the child at the home of V.B.G's parents. During that period, B.C. agreed to pay $50 in weekly child support. However, B.C. only sent three $50 checks, dated December 15, 1990, December 28, 1990, and January 5, 1991, all returned by the bank for insufficient funds. B.C. has no further support

payments, nor has he sent cards or gifts for the child. From January 1991 onward, B.C. occasionally telephoned V.B.G. concerning the child, but those calls were negatively terminated after arguments ensued over the issue of support. V.B.G. and G.G. met about six months after D.C.B.'s birth. They were married on July 15, 1995. B.C. also married in 1995. In the fall of that year, B.C. and his wife went to the home of V.B.G. and G.G. to speak with V.B.G., but she refused to see him, G.G. sending them away.

The procedural history began January 18, 1996, when the paternal grandmother, B.M.C., filed a complaint in Superior Court, Chancery Division, Family Part, Middlesex County, seeking visitation with her grandson pursuant to N.J.S.A. 9:2-7.1. B.M.C. had never seen D.C.B., but had sent the child correspondence and money. V.B.G. and G.G. jointly responded to that complaint with a motion seeking denial of visitation or, alternatively, supervised visitation; a mental health fitness evaluation of B.M.C. prior to initiating visitation; an investigation and background check on B.M.C.; and child support. There were discussions between B.M.C. and V.B.G. concerning visitation, resulting in B.M.C. withdrawing her complaint, and the matter was dismissed on January 30, 1996. The parties were unable to facilitate their resolution of the visitation issue, so B.M.C. filed a second grandparent visitation complaint in Middlesex County on February 21, 1996. By order entered April 18, 1996, the case was adjourned, and a probation investigation ordered of V.B.G., B.M.C., and B.C. in accordance with R. 5:8-1.

On May 7,1996, with V.B.G.'s consent, G.G. filed a stepparent adoption complaint in Middlesex County, seeking termination of B.C.'s parental rights and adoption of D.C.B. Pursuant to N.J.S.A. 9:3-48a, the court entered an order declaring D.C.B. a ward of the court; vested custody of the child with G.G.; provided

for service of the adoption complaint and order on B.C.; set July 19, 1996 as the return date for a preliminary hearing; and, pursuant to N.J.S.A. 9:3-48(a) (2), dispensed with the appointment of an approved agency to undertake an investigation and report, with the understanding the court shall take direct evidence at the time of the preliminary hearing of the facts and circumstances surrounding the adoption.

When the adoption complaint was filed, B.C. was incarcerated on drug charges. He was served and, on June 12, 1996, filed an objection to the proposed adoption, and requested an adjournment due to his imprisonment. B.M.C., her grandparent visitation case still pending, also filed an objection to the adoption on that date.

On January 13, 1997, V.B.G. filed and served a motion in the grandparent visitation case, seeking summary judgment dismissing B.M.C.'s complaint. In the interim, on application of G.G. in the adoption case, an order was entered on January 24, 1997 appointing Family Options Adoption Agency to prepare a report, and also appointed counsel for the child. However, appointed counsel's request to be relieved of that appointment was granted by the assignment judge on February 10, 1997. The record does not reflect appointment of substitute counsel for D.C.B.

On February 5, 1997, G.G. filed a motion seeking a change of venue, based on residency of the child in Somerset County. On March 7, 1997, the court entered an order transferring venue of the adoption case to Superior Court, Chancery Division, Family Part, Somerset County. On March 19, 1997, an amended order for preliminary hearing was entered in the adoption case, declaring D.C.B. to be a ward of the court; placing custody of the child with G.G. and V.B.G. pending further order; dispensing with appointment of an approved agency to investigate and

report to the court; setting May 23, 1997 as the return date for a hearing of the facts and circumstances surrounding the adoption; and providing for service of B.C. with the amended order at least 20 days prior to the hearing date. The issue of counsel, or guardian ad litem, for the child was not addressed.

Meanwhile, the custody and visitation probation report ordered on April 18, 1996 was finally issued by Middlesex County on March 7, 1997. It recommended B.M.C. and B.C. be provided supervised visitation with D.C.B., and that V.B.G. and G.G. consider placing D.C.B. in counseling to address family origin issues, and to assist the child in adjusting to the visitation arrangement. The motion of V.B.G. seeking summary judgment dismissing B.M.C.'s grandparent visitation complaint was heard on the papers April 1, 1997, in Middlesex County. With apparent reliance on the probation report, the court executed an order on April 7, 1997, denying V.B.G.'s motion, and ordering supervised visitation for B.M.C., at the home of V.B.G. for one hour on alternate Sundays.

On April 8, 1997, V.B.G. filed a motion seeking an order striking the probation report, followed by a second motion filed on April 9, 1997, seeking psychological evaluations of the child and all parties at B.M.C.'s cost. On that same date, V.B.G. filed a third motion, on an emergent basis, seeking a stay of the April 7, 1997 grandparent visitation order, pending completion of the psychological evaluations sought, and conclusion of the pending adoption proceeding. She also sought reconsideration of the April 7, 1997 order denying her summary judgment motion. The court entered an order on April 10, 1997, staying the grandparent visitation order, and directing the motion for reconsideration be heard on May 1, 1997. As he was not specifically included in the visitation ordered on April 7, 1997, despite being included in the original probation investigation

ordered April 18, 1996, B.C. then filed a separate complaint in Middlesex County on April 11, 1997, seeking visitation with D.C.B. On April 21, 1997, B.M.C. filed a motion to lift the stay, seeking the visitation granted in the April 7, 1997 order.

On May 1, 1997, an order was entered transferring venue of the complaints of B.M.C. and B.C. for visitation to Somerset County Superior Court, Chancery Division, Family Part, and ordering they may be consolidated with the stepparent adoption case pending in Somerset County, upon further order of that court. Accordingly, as of May 1, 1997, all matters were pending in Somerset County.

On May 23, 1997, the court conducted a scheduling hearing to determine procedure on the adoption and visitation complaints. The court decided to proceed first with a hearing on B.C.' s objections to the adoption, scheduling same to commence July 15, 1997. In the interim, the stay of visitation entered April 10, 1997 was continued.

On June 24, 1997, G.G. filed a motion seeking an order compelling all parties, and the child, to undergo psychological evaluations to assist the court in determining the adoption and visitation issues. B.C., who was released into the Intensive Supervision Program (ISP) on July 20, 1996, was not able to appear at the July 15, 1997 preliminary hearing because he was reincarcerated on an ISP violation, so the matter was adjourned. The court declined to order psychological evaluations, determining it would first focus on the "abandonment" basis for dismissal of B.C.'s objections to the proposed adoption in N.J.S.A. 9:3-46a(1). By letter dated October 24, 1997, the trial judge scheduled the adoption case for a preliminary hearing on B.C.'s filed objections for November 12, 1997, and arranged for B.C., who was still incarcerated, to be transported to the court. The hearing took place on November 12, 1997 in the

presence of B.C., V.B.G. and G.G., all appearing pro se, and B.M.C., represented by counsel. The trial judge focused on the issue of whether B.C. substantially failed to perform the regular and expected parental functions of care and support of the child, although able to do so. See N.J.S.A. 9:3-46a(1). The only witnesses testifying were the mother, V.B.G., and the natural father, B.C. G.G., the stepfather and plaintiff in the adoption case, did not testify, and B.M.C., through counsel, elected not to testify or call witnesses. There is some confusion in the record concerning whether B.M.C.'s counsel was also acting as attorney for B.C. at the November 12, 1997 hearing. A review of the transcript would certainly lead one to conclude that he was. The trial judge reserved, indicating a written decision would be forthcoming.

On the very next day, November 13, 1997, G.G. filed a motion seeking recusal of the trial judge; a new hearing on the adoption issue; and a stay of the proceedings. On November 20, 1997, V.B.G. filed similar motions for recusal in the visitation actions. On February 6, 1998, the trial judge issued a seven-page written decision, and executed an order dismissing the objections of B.C. to G.G.'s stepparent adoption, and denying the motions of G.G. and V.B.G. for recusal, a new trial and a stay of the proceedings. While this order does not specifically address B.M.C.'s objections to the adoption, or her claim for visitation, the written decision states B.M.C.'s rights are derivative, and must rest upon the rights of B.C., if any.

The notice of appeal on behalf of B.C. and B.M.C. was filed on March 24, 1998. The adoption proceeding was adjourned, pending resolution of this appeal. G.G. and V.B.G. filed two motions to dismiss this appeal, which were denied. On appeal, B.C. and B.M.C. present the following arguments:

POINT I
THE TRIAL COURT ERRED WHEN IT APPLIED A NARROW MECHANISTIC LEGAL ANALYSIS TO DETERMINE WHETHER TO DISMISS B.C.'S OBJECTION TO THE ADOPTION.

POINT II
THE TRIAL COURT ERRED IN APPLYING THE LAW BY DETERMINING THAT B.M.C.'S GRANDPARENT VISITATION RIGHTS ARE DERIVATIVE TO THE NATURAL FATHER B.C.'S PARENTAL RIGHTS.

POINT III
THE PROCEDURE BELOW RESULTED IN AN INFRINGEMENT OF B.C.'S RIGHTS.

POINT IV
THE MATTER SHOULD BE REMANDED BACK TO A NEW FACT FINDER.

II.

Appellants contend the trial judge erred in failing to utilize the assistance of an approved agency investigation, as contemplated by the adoption statute. Under N.J.S.A. 9:3-48a, when the child sought to be adopted has not been received from an approved agency, the court shall appoint an approved agency to make an investigation and submit a written report evaluating the prospective adoptive parents and the circumstances surrounding the proposed adoption. The court is authorized by N.J.S.A. 9:3-48a(4) to exercise its discretion when considering a

stepparent adoption concerning the approved agency investigation and report, as follows:

> Whenever a plaintiff is a stepparent of the child, the court, in its discretion, may dispense with the agency investigation and report and take direct evidence at the preliminary hearing of the facts and circumstances surrounding the filing of the complaint for adoption.
> (N.J.S.A. 9:3-48(a) (4).)

In In re the Adoption of a Child by Mercado, 182 N.J. Super. 628, (App. Div. 1982), the stepfather of a child sought adoption over the objections of the natural father. The trial judge found there was a willful and continuous failure on the part of the natural father to exercise his parental obligations, which failure was likely to continue, and terminated his parental rights. Relying on N.J.S.A. 9:3-48a(4), the trial judge did not order the agency investigation. In reversing, we held that when there is an objection to the adoption from a natural parent, it is inappropriate to dispense with the agency investigation. Mercado, at 630. We also recognized the need for independent representation for the child in a contested case. Mercado, at 630-31. Appointment of counsel or a guardian ad litem, or both, was particularly important here, in view of the probation report recommending visitation for the natural father and paternal grandmother. We see no reason here to depart from these established procedural guidelines.

There are basic and sound reasons for imposition of these procedural safeguards. As we stated in the recent stepparent adoption case, Adoption of Children by G.P.B., 311 N.J. Super. 38 (App. Div. 1998):

> A birth parent's right "to enjoy a relationship with his or her child is fundamental and constitutionally protected," In re Adoption of a Child by D.M.H., 135 N.J. 473, 480, 641 A.2d 235, cert. denied, 513 U.S. 967, 115 S.Ct. 433, 130 L.Ed.2d 345 (1994). The right to conceive and raise one's child is deemed essential and is far more significant than a property right. New Jersey Div. of Youth and Family Servs. v. A.W., 103 N.J. 591, 599, 512 A.2d 438 (1986). Therefore, any inquiry regarding the termination of parental rights must be analyzed in light of the very strong protections that are afforded to those rights. D.M.H., supra.
> (Id. at 42-43.)

In considering adoption over the objection of a natural parent, a court must proceed with caution and circumspection, fully evaluating parental misconduct and, if appropriate, the welfare of the child. In re Adoption of Two Children by J.J.P., 175 N.J. Super. 420, 426-27 (App. Div. 1980).

The standards governing an adoption over the objection of a birth parent have been codified in N.J.S.A. 9:3-46, recently amended by L. 1998, c. 20, §2, effective September 11, 1998, which provides, in part:

> a. (I)n a contest between a person who is entitled to notice pursuant to section 9 of P.L.1977, c.367 (C.9:3-45) objecting to the adoption and the prospective adoptive parent, the standard shall be the best interest of

the child. The best interest of a child requires that a parent affirmatively assume the duties encompassed by the role of being a parent. In determining whether a parent has affirmatively assumed the duties of a parent, the court shall consider, but is not limited to consideration of, the fulfillment of financial obligations for the birth and care of the child, demonstration of continued interest in the child, demonstration of a genuine effort to maintain communication with the child, and demonstration of the establishment and maintenance of a place of importance in the child's life.

A judgment of adoption shall be entered over an objection of a person who is entitled to notice pursuant to section 9 of P.L. 1977 c. 36 (c.9:3-45) communicated to the court by personal appearance of by letter if the court finds during the six month period prior to the placement of the child for adoption or within 120 days after the birth of a child or prior to the date of the preliminary hearing, whichever occurs first, in the case of a child placed for adoption as a newborn infant:

(1) that the parent has substantially failed to perform the regular and expected parental functions of care and support of the child, although able to do so, or

(2) that the parent is unable to perform the regular and expected parental functions of care and support of the child and that the parent's inability to perform those functions is unlikely to change in the immediate future.

The regular and expected functions of care and support of a child shall include the following:

(a) the maintenance of a relationship with the child such that the child perceives the person as his parent;

(b) communicating with the child or person having legal custody of the child and parenting time rights, or unless prevented from so doing by the custodial parent or other custodian of the child or a social service agency over the birth parent's objection; or

(c) providing financial support for the child unless prevented from doing so by the custodial parent or other custodian of the child or a social service agency.

A parent shall be presumed to have failed to perform the regular and expected parental functions of care and support of the child if the court finds that the situation set forth in paragraph (1) or (2) during the six month period prior to the placement of

> the child for adoption, or within 120 days after the birth of the child or prior to the date of the preliminary hearing, whichever occurs first, in the case of a child placed for adoption as a newborn infant.
>
> In the case where the objecting parent is incarcerated during the six month period prior to the placement of the child for adoption, relevant factors to be considered in determining whether that incarcerated parent has failed to perform the regular and expected parental functions or is unable to perform the regular and expected parental functions pursuant to this subsection, shall include the extent of the relationship which existed between the parent and child prior to incarceration, including financial support; the efforts made to continue a relationship during the incarceration; the ability to communicate and visit with the child during incarceration, and the effect of the communication and visitation on the child's development in terms of providing nurturing and emotional support.
> (N.J.S.A. 9:3-46.)

These recent amendments represent a significant clarification in the standards applicable when considering an adoption over the objection of a natural parent. The Legislature has made it clear the standard in such a contest remains the "best interest of the child", requiring that a parent affirmatively assume

the duties encompassed by the role of being a parent. In making a determination whether a parent has affirmatively assumed those parental duties, specific, yet non-inclusive, considerations are listed in the statute. The language in N.J.S.A. 9:3-46 has also been modified by this amendment to make it clear a judgment of adoption "shall" be entered over an objection of a parent if the court finds the presence of conditions set forth in N.J.S.A. 9:3-46a(1) or (2) during the six-month period prior to the date of the preliminary hearing. These recent changes also provide specific factors to consider in cases where the objecting parent is incarcerated during that six-month period. These statutory changes will provide further guidance to the trial court on remand.

We have previously held the listed parental functions in the prior version of N.J.S.A. 9:3-46 should not be viewed as constituting an all-inclusive list, and were provided by the Legislature as an attempt to identify the core values of parenthood. In re Adoption of a Child by W.P. and M.P., 308 N.J. Super. 376, 383-84 (App. Div. 1998). Further, we rejected the notion that the Legislature intended to compel automatic severance of parental ties if a parent cannot perform one or more of the listed core functions for the stated time period. Id. at 385. We noted therein:

> Instead, termination hinges upon whether continuation of the parental relationship would place the child in imminent danger of serious harm, and the standards listed in the statute are to be considered within that context. (W.P. and M.P., at 386.)

The standards provided by the Legislature must be considered within the context of whether continuation of the parental relationship places the child in

imminent danger of serious harm. Adoption of Children by G.P.B., 311 N.J. Super. at 45. Nothing in the recent statutory amendment alters these rulings.

In a private placement adoption, which category includes stepparent adoptions, the overall circumstances concerning the placement of the child, the actions of all parties and their fitness, including that of the person seeking adoption, must be fully explored in order to properly apply the standards contained in N.J.S.A. 9:3-46. This examination and investigation should be accomplished by an independent agency, and be not only from the perspective of the birth parents and person seeking the adoption, but also from the perspective of the child, as seen through an independent representative, whether that be by way of appointment of counsel for the child in accordance with R. 5:8A, or through appointment of a guardian ad litem pursuant to R. 5:8B, or both.

Here, the approved agency report was dispensed with. The probation investigation ordered and received is not an adequate substitute for same, as the scope of the probation investigation was limited to the issue of visitation, not placement for adoption. Although an attorney was initially appointed for the child, he was permitted to withdraw, and no replacement was named. These are serious procedural irregularities. Additionally, there was no analysis of whether B.C.'s periods of incarceration had any impact on his failure to perform the regular and expected functions of care and support.

On remand, the trial judge should reconsider the appropriateness of ordering the psychological evaluations requested by G.G. in his motion filed June 24, 1997, to assist the court in evaluating the adoption and visitation issues. This would provide the court with additional information concerning fitness of

all parties and the bonding and attachment of the child to the parties.

In view of these clear deviations from established procedural standards, we are compelled to reverse the order dismissing B.C.'s objections to the adoption, and remand the matter for ordering an approved agency investigation, appointment of an attorney or guardian ad litem for the child, or both, and a new hearing. The court shall also reconsider G.G.'s motion seeking psychological evaluations.

III.

B.C. and B.M.C. contend the matter should be remanded to a new fact-finder. A matter remanded after appeal for a new trial should be assigned to a different judge if the first judge had expressed conclusions regarding witness credibility during the original trial. See New Jersey Div. of Youth and Family Services v. A.W., 103 N.J. 591, 617-18 (1986); In re Guardianship of R.G. and F., 155 N.J. Super. 186, 195 (App. Div. 1977); R. 1:12-1(d). Here, the testimony was at variance in several areas, requiring the trial judge to make findings of fact and conclusions based thereon that necessarily involved credibility determinations. Accordingly, it is appropriate for a different judge to conduct the hearing on remand.

A careful review of the record reveals the volatility of this case. This is not uncommon in family-related matters. To an extent, it is understandable, as emotions run high in cases where the stakes are of such a significance. The trial judge properly handled those very delicate and difficult aspects of the case, and correctly denied the post-trial motions of G.G. and V.B.G. for recusal.

IV.

B.M.C. argues the trial judge erred in finding her visitation rights were derivative of B.C.'s parental rights. The trial judge ruled that because B.M.C. had never seen or visited with her grandchild, any visitation rights she had must rest upon the rights of B.C. As we pointed out in Matter of Guardianship of K.H.O., 308 N.J. Super. 432, 435-36 (App. Div.), certif. granted, ___ N.J. __ (1998):

> Under the existing law, termination severs all legally mandated ties with the parent. We are not so sure as to extended biological family members, particularly grandparents and siblings. Cf. S.M. v. A.W., 281 N.J. Super. 63, 656 A.2d 841 (App. Div.), certif. denied, 142 N.J. 571, 667 A.2d 189 (1995) (according maternal grandmother rights to seek custody of grandchild where deceased daughter's parenting deficiencies led to foster care.). Their continued rights to court ordered visitations, for instance, may very well survive termination of the parental rights. See N.J.S.A. 9:2-7.1; R.K. v. A.J.B., 284 N.J. Super. 687, 666 A.2d 215 (Ch. Div. 1995). But the practicalities of such continued contact with the extended biological family may well discourage judicial enforcement of such post-adoption contact. See Mimkon v. Ford, 66 N.J. 426, 332 A.2d 199 (1975).
> (Id., at 435-36 n.2.)

In S.R. v. Div. of Youth & Family Services, 311 N.J. Super. 431 (App. Div. 1998), we affirmed dismissal of a grandmother's complaint for custody filed subsequent to termination of the parental rights of the natural parents and reposing guardianship with the Division of Youth and Family Services, noting that the grandmother was aware of the guardianship proceedings, yet failed to intervene. Here, B.M.C. filed a complaint for visitation, and interposed an objection to the proposed adoption. We have also ruled that where grandparents have a direct, personal, relationship with the grandchild, their rights are considered independent of the parents' rights. N.J. Div. Youth & Family Serv. v. E.D., 233 N.J. Super. 401, 416 (App. Div.), certif. denied, 118 N.J. 232 (1989).

In our view, the issue of whether a grandparent is entitled to visitation can only be answered through a careful analysis of the statutory factors set forth in N.J.S.A. 9:2-7.1, where it remains the burden of the grandparent to prove by a preponderance of the evidence that the granting of visitation is in the best interests of the child. The grandparent's prior relationship with the child is only one factor to consider. It may be the dispositive factor, but must be considered in conjunction with the remaining statutory factors. On remand, the trial judge should take evidence on, make findings on, and examine these statutory factors in light of all the facts and circumstances, including considering the determination made concerning B.C.'s parental rights. The weighing of these factors is a matter best left to the discretion of the trial judge, the finder of fact.

V.

Since we have reversed and remanded based on the procedural irregularities, we need not rule on

the remaining arguments. However, we feel some guidance would be helpful on the "abandonment" issue.

The trial judge focused on whether B.C.'s actions constituted an "abandonment" of his parental rights under N.J.S.A. 9:3-46a(1). The determination of abandonment is fact-oriented. In re Adoption of a Child by D.M.H., 135 N.J. 473, 481, cert. denied, 513 U.S. 967, 115 S.Ct. 433, 130 L.Ed.2d. 345 (1994). While In re Adoption of a Child by F.O. and W.O., 307 N.J. Super. 176, 184 (Ch. Div. 1997) and In re Adoption of a Child by R.K., 303 N.J. Super. 182, 196 (Ch. Div. 1997) have held the natural parent's subjective mental state is no longer at issue in the "abandonment" analysis, we have held to the contrary. In re Guardianship of D.M.H., 309 N.J. Super. 179, 210-02 (App. Div. 1998); Adoption of Children by G.P.B., 311 N.J. Super. at 45. We note there were significant findings on the abandonment issue by the trial judge which adequately addressed the subjectivity requirement. It may very well be that B.C.'s conduct constitutes sufficient reason to terminate his parental rights. On remand, the abandonment issue shall be reconsidered in light of evidence presented at the new hearing. The recent amendments to N.J.S.A. 9:3-46 provide additional guidance.

VI.

In summary, we reverse the order dismissing B.C.'s objections to this stepparent adoption and the determination B.M.C.'s request for grandparent visitation are solely derivative through B.C.'s rights, and remand the matter for a new hearing. The trial court shall order an approved agency investigation; appoint an attorney or guardian ad litem, or both, for the child; reconsider G.G.'s motion for psychological

evaluations; and take evidence and make findings on the criteria in N.J.S.A. 9:2-7.1 concerning B.M.C.'s request for visitation.

Reversed, and remanded. We do not retain jurisdiction.

NEW JERSEY APPELLATE DIVISION

IN THE MATTER OF THE
ADOPTION OF DEREK
CHRISTOPHER BISCHOFF
BY GREGORY J. GIBERNA.

No.004023-97T5

ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION OF REVERSAL OF TRIAL COURT ORDER

(Filed Oct. 27, 1998)

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS THIS 2ND DAY OF November, 1998, HEREBY ORDERED AS FOLLOWS:

MOTION BY RESPONDENT
- FOR RECONSIDERATION — DENIED

/s/ J. E. Wallace, Jr.
J. E. Wallace, Jr.
APPELLATE COURT JUDGE

SUPREME COURT OF NEW JERSEY

IN THE MATTER OF THE
ADOPTION OF DEREK
CHRISTOPHER BISCHOFF
BY GREGORY J. GIBERNA.

No. 47,017

ORDER DENYING PETITION FOR CERTIFICATION

(Filed Dec. 14, 1998)

To the Appellate Division, Superior Court:

A petition for Certification of the judgement in A-4023-97 having been submitted to this Court, and the Court having considered same;

It is ORDERED that the petition for Certification is denied, with costs.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 3rd day of August, 1999.

/s/ D. T. Poritz
D. T. Poritz
CHIEF JUSTICE

9:3-48. Action on complaint for adoption; child not received from approved agency.

a. When the child to be adopted has not been received from approved agency, the prospective parent shall file with the court a complaint for adoption. Upon receipt of the complaint, the court shall by its order

(2) that whenever the plaintiff is a stepparent of the child, the court may dispense with the agency investigation and report and take direct evidence at the preliminary hearing of the facts and circumstances surrounding the adoption;

c.

(4) If the plaintiff is a brother, sister, grandparent, aunt, uncle, natural father, stepparent or foster parent of the child, or if the child has been in the home of the plaintiff for at least 2 years immediately preceding the commencement of the adoption action, and if the court is satisfied that the best interests of the child would be promoted by the adoption the court may dispense with such evaluation and final hearing and enter judgement of adoption immediately upon completion of the preliminary hearing.

9:2-7.1. Visitation rights for grandparents or siblings.

a. A grandparent or any sibling of a child residing in this State may make application before the Superior Court, in accordance with the Rules of Court, for an order for visitation. It shall be the burden of the applicant to prove by a preponderance of the evidence that the granting of visitation is in the best interests of the child.

b. In making a determination on an application filed pursuant to this section, the court shall consider the following factors:

(1) The relationship between the child and the applicant;

(2) The relationship between each of the child's parents or the person with whom the child is residing and the applicant;

(3) The time which has elapsed since the child last had contact with the applicant;

(4) The effect that such visitation will have on the relationship between the child and the child's parents or the person with whom the child is residing;

(5) If the parents are divorced or separated, the time sharing arrangement which exists between the parents with regard to the child;

(6) The good faith of the applicant in filing the application;

(7) Any history of physical, emotional or sexual abuse or neglect by the applicant; and

(8) Any other factor relevant to the best interests of the child.

c. With regard to any application made pursuant to this section, it shall be prima facie evidence that visitation is in the child's best interest if the applicant had, in the past, been a full-time caretaker for the child.

United States Constitution

Amendment XIV. Right's to Privacy, Due Process & Equal Protection Under the Law.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.